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Carl Bauer
University of Arizona

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A TRIBUTE TO DAN TARLOCK FROM BEYOND THE LEGAL
ACADEMY

CARL BAUER*

As a student of water rights, I have learned from Dan Tarlock's books and papers since the 1980s, but it is as a teacher over the past decade that I really became a fan of his work. I teach comparative and international water policy to graduate students and advanced undergrads at the University of Arizona. We look at water rights, water markets, river basin conflicts, environmental flows, and government regulations in the western United States, Spain, Chile, Australia, the European Union, and elsewhere, from the viewpoints of law, political economy, history, and geography. What can I give students to read about these places that will help them understand not only the legal technicalities but also how a water rights system actually works on the ground? How can I help students master arcane terminology without losing sight of the big historical and environmental picture?

In the western United States especially, water rights are the subject of a vast literature and mythology, legal and otherwise. To me, Dan represents the best of a certain category of U.S. lawyer and legal academic: able to cut through the fog of complicated and contradictory legal rules; open to a range of other academic disciplines; and with a strong sense of history and its daily impact on how people go about their business. Dan's approach combines breadth of vision with a nose for the direct and concrete. He writes about the law in action as well as the law on the books.

I will cite just three examples. I assign to my graduate students Dan's 2001 paper, *The Future of Prior Appropriation in the New West*, in the *Natural Resources Journal*.¹ His basic argument is that there is a gap between the form of prior appropriation law and the substance, and the substance evolves more rapidly over time because it is affected by powerful forces outside the law. To support that argument, Dan takes the reader on a historical tour of the pros and cons of the appropriation doctrine in both the Old West and the New; the rise of federal water projects and how storage capacity affected water rights; water governance at the scale of river basins;

* Professor, School of Geography & Development, University of Arizona, cjbauer@email.arizona.edu.

1. A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769 (2001).

and finally, a nuanced explanation of how and why prior appropriation is rarely enforced in practice the way it is described in theory. The whole paper is sprinkled with insights about how the Western water rights system has worked and evolved over the past 150 years.

The second example is the book Dan wrote with Holly Doremus, *Water War in the Klamath Basin*,² which I assign to undergrads as well as grad students. The book is a multi-faceted story of conflicts among diverse water users, in which a tangle of environmental and natural resource laws intersect. The reader is led through the physical geography of the river basin; the history of water rights and water development in the West; federal reserved water rights for Indian tribes and later for wildlife protection; the Endangered Species Act and its many controversies; the roles of science in legal process; and lastly an overview of different political and institutional arenas for trying to resolve these problems—including politics, courts, markets, collaboration, and the Federal Energy Regulatory Commission. Through it all, the authors move easily back and forth from law to various social and natural sciences. I think it is a tour de force.

We should celebrate the fact that two U.S. law professors can write such a readable and interdisciplinary book. In my experience, lawyers and legal academics in other countries rarely have as much permeability to other fields of knowledge. There is also something about water, its weird nature and vital importance, that calls water specialists to cross disciplinary boundaries more than most specialists do.

Over a decade ago my own trajectory led me to turn my attention from water to include electricity, especially where the water and electricity sectors intersect in hydropower dams. Today this intersection is called the “water/energy nexus.” After studying hydropower in Chile for many years, I returned to the western United States and, after about five years, I began to study hydropower here from the same dual perspective. Imagine my relief when I discovered that Dan Tarlock had already been there and written about it. I knew that I could rely on his command of the field to give me good background and help me focus my own efforts on doing something new and different. And it gave me more juicy reading to assign to my students: Dan’s 2012 paper, *Hydro Law and the Future of Hydroelectric Power Generation in the United States*, in the *Vanderbilt Law Review*.³

2. HOLLY DOREMUS & A. DAN TARLOCK, *WATER WAR IN THE KLAMATH BASIN: MACHO LAW, COMBAT BIOLOGY, AND DIRTY POLITICS* (2008).

3. Dan Tarlock, *Hydro Law and the Future of Hydroelectric Power Generation in the United States*, 65 VAND. L. REV. 1723 (2012).

I want to close by thanking Dan for a comment that I'm sure others have heard him say, too: "Water law is the gift that keeps on giving." You have to get over the threshold into the room of water law, but once you're there, you have a unique and inside perspective on many of the world's key social and environmental problems. As a fellow member of the international brotherhood and sisterhood of water geeks, I couldn't agree more.